

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

287A

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,488

Frank E. Wesley, Appellant

v.

United States of America, Appellee

Appeal from Final Judgment of the
United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 28 1969

Nathan J. Paulson
CLERK

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(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

The following questions are presented on this appeal:

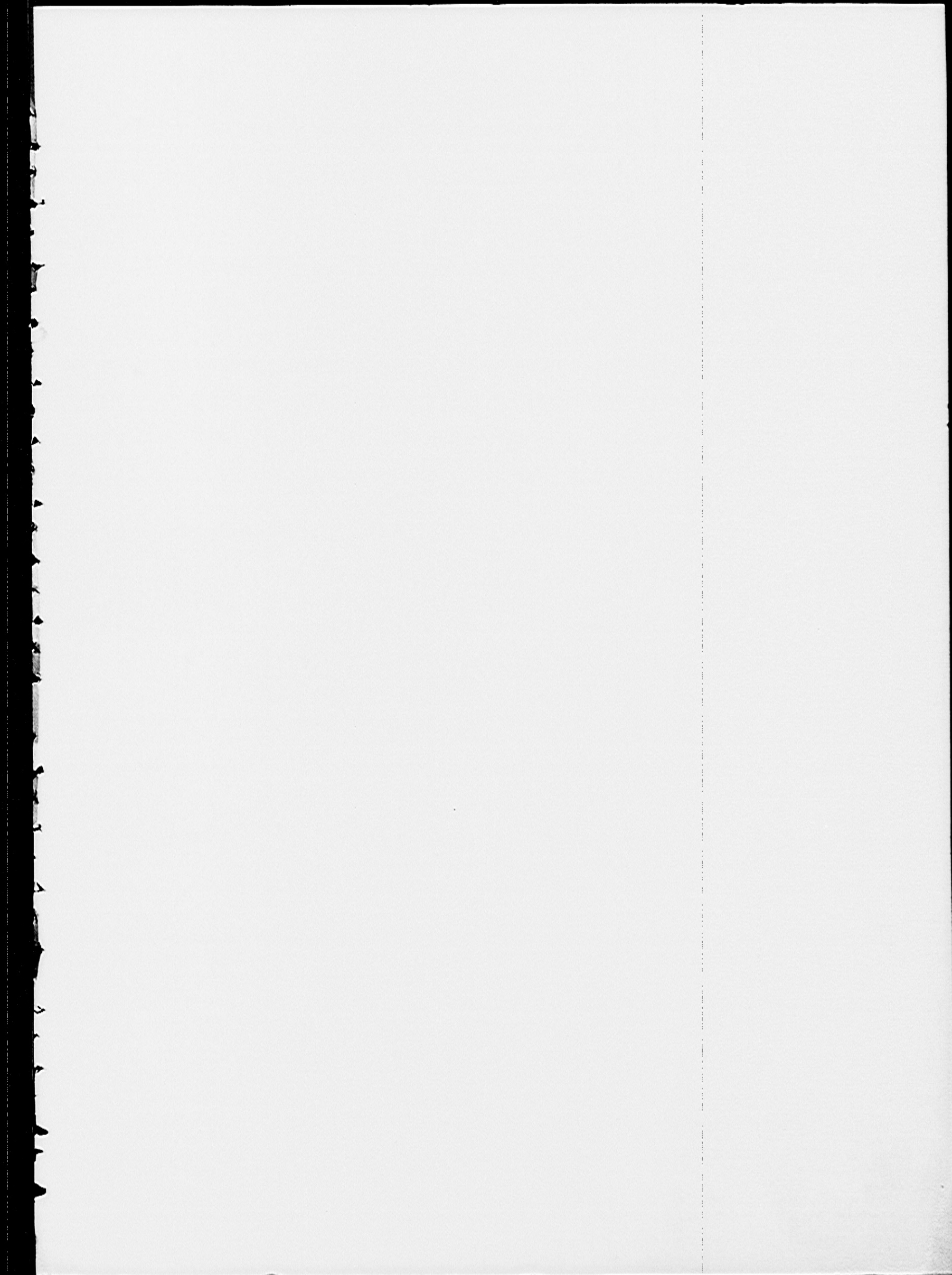
(1) Did the Court below err in holding as a result of a preliminary hearing that there was sufficient evidence for a jury to find beyond a reasonable doubt that alleged statements of the appellant while in custody were voluntarily made?

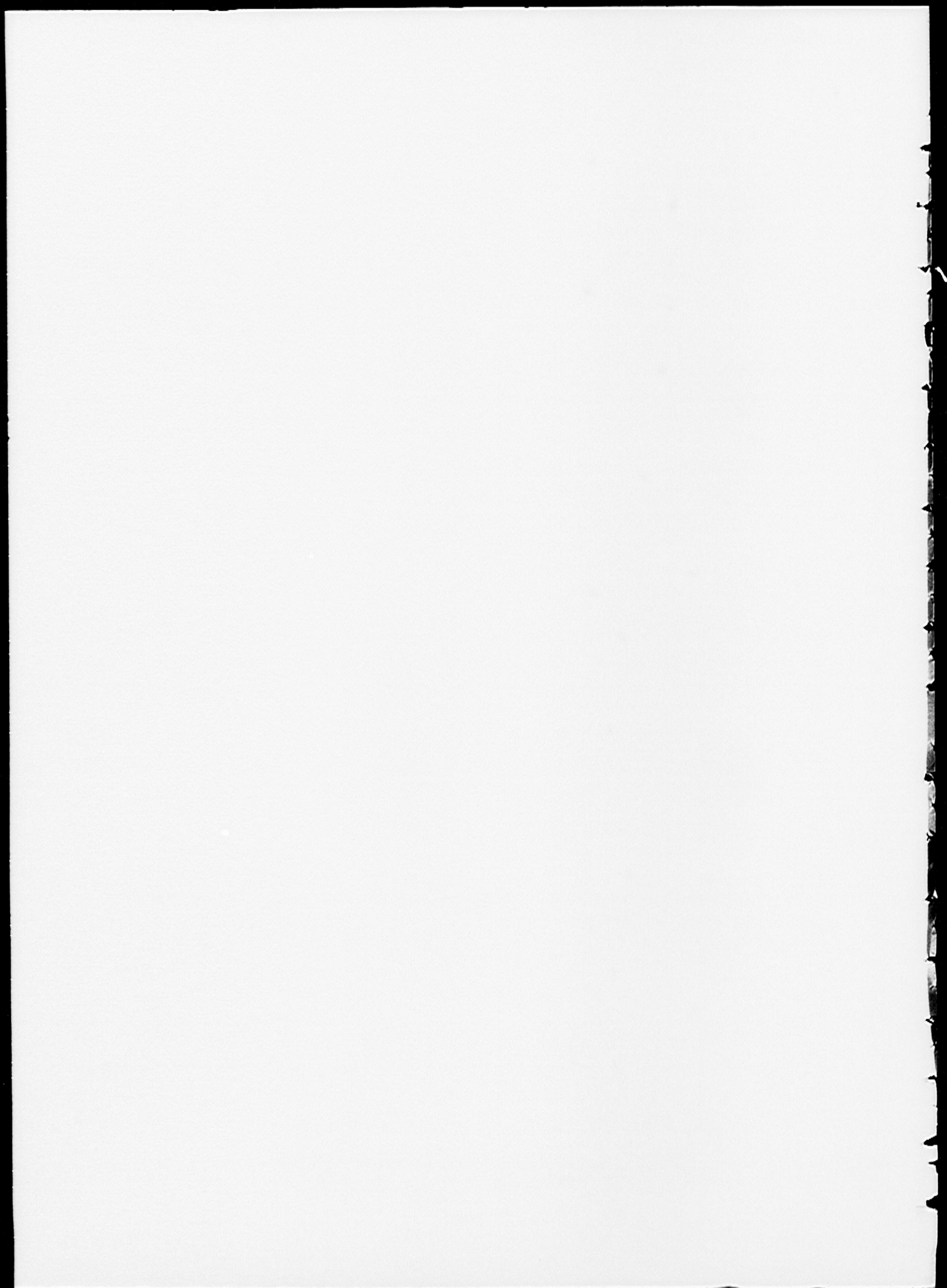
(2) Was it improper for the trial court to permit the introduction of a Government exhibit into evidence after both the Government and the defense had rested their cases?

(3) After the Government chose not to offer appellant's statements into evidence during its case-in-chief, was the appellant deprived of his full right to decide whether to remain silent or testify in his own behalf when the Court failed to rule in advance whether such statements offered in rebuttal would be received as evidence or limited to impeachment?

(4) In failing to instruct the jury that a statement of a defendant, found to be involuntarily made, could not be used to impeach his testimony despite its character as a prior inconsistent statement, was the charge of the trial court so misleading as to affect substantial rights of the appellant?

The case of this appellant has not previously been before this Court.





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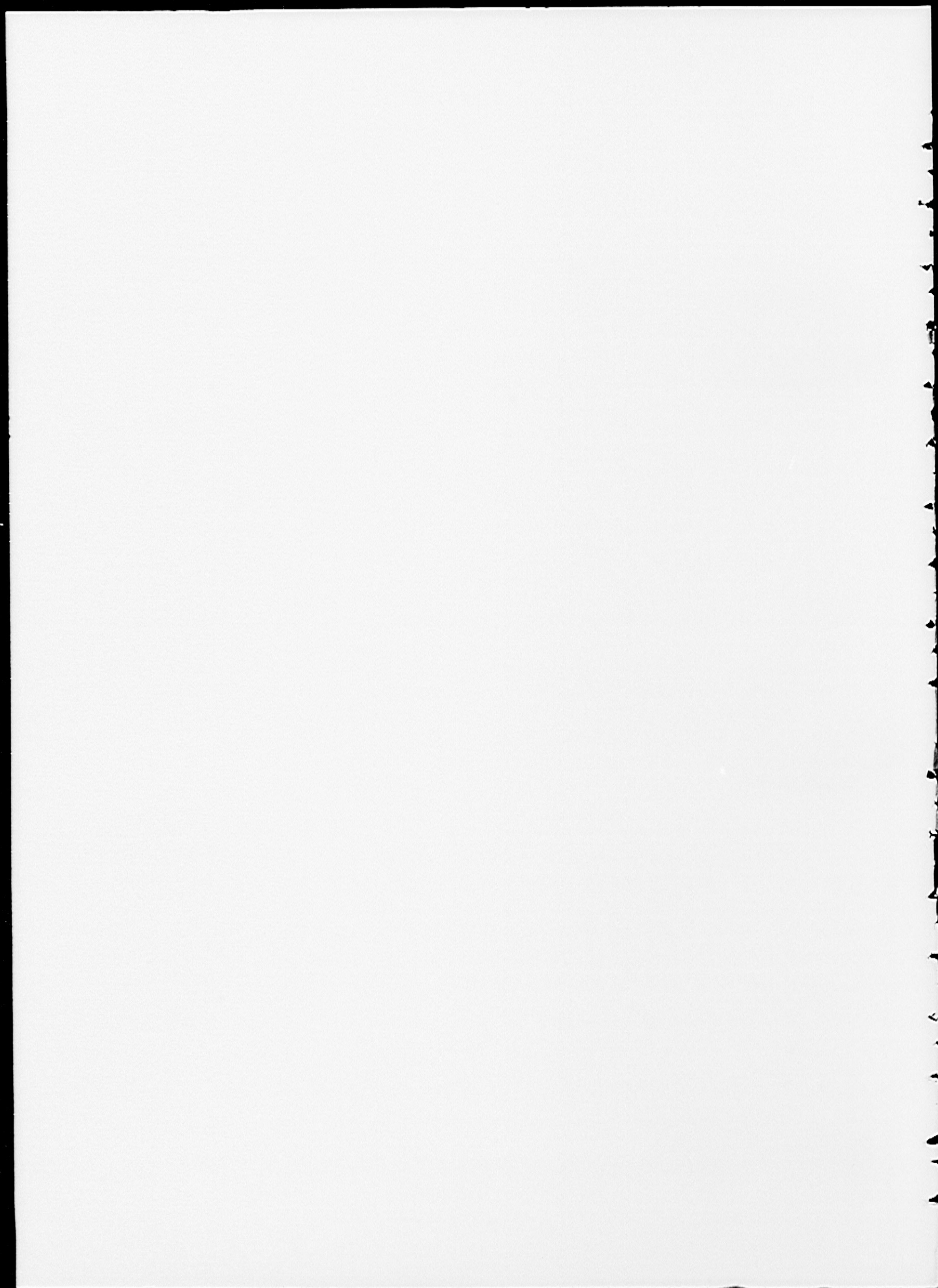
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No. 22,488

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Appeal from Final Judgment of the
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Brief for Appellant

STATEMENT OF JURISDICTION

Appellant was charged in an indictment, filed on December 20, 1967, with one count of the unauthorized use of a motor vehicle in violation of Section 22-2204 of the District of Columbia Code. After entering a plea of not guilty to the charge in the indictment, appellant came to trial in the United States District Court for the District of Columbia on September 12, 1968. (Criminal No. 1574-67). Appellant was found guilty of the unauthorized use of a motor vehicle and sentenced to imprisonment under the provisions of the Youth Corrections Act, 18 U.S.C. §5010(b). The order of Judgment and Commitment was filed on October 28, 1968.

Upon the filing of an affidavit in support of his application for leave to appeal to this Court in forma pauperis, the application of appellant was granted by the United States District Court on October 25, 1968. This Court has jurisdiction under 28 U.S.C. §1291 (1964) of this appeal from the final judgment entered by the District Court.

STATEMENT OF THE CASE

Appellant was charged in a one count indictment with the unauthorized use of a motor vehicle belonging to one Burtell Jefferson, identified at the time of trial as an officer in the Metropolitan Police Department for the District of Columbia.

The case came to trial on September 12, 1968. After receiving the testimony of the first witness for the Government, the Court below conducted a hearing out of the presence of the jury to determine whether certain statements allegedly made by the appellant while in custody were illegally obtained (Tr. beginning at 35).

During the hearing evidence was presented that the appellant was taken into custody by several police officers in the vicinity of the motor vehicle, the unauthorized use of which was alleged. A witness for the Government testified during the hearing and at trial that the appellant was handcuffed to a tree or utility pole (Tr. 39,123) and acknowledged that at the time there were at least six police officers near appellant, most of whom were in uniform (Tr. 44).

Appellant testified that he was struck on the head by one of the police officers and subsequently became sick while handcuffed, but this testimony was controverted.

A witness for the Government testified that appellant was advised of his right to remain silent and of his right to counsel at the scene of the arrest, but that the appellant, after being so advised, stated that an acquaintance of the appellant had given the car to him shortly before the arrest (Tr. 38).

A second witness for the Government, Burtell Jackson, who had previously stated to the jury that he was the owner of the car, testified that after the defendant had been directly brought to the Fourteenth Precinct police station he was taken to a room in the station where he was subjected to questioning during processing (Tr. 47). Jefferson testified that during this time, the appellant looked over at him and said:

"I guess you're mad at me, aren't you?"

Jefferson testified he acknowledged he was mad and that the appellant in response to his question admitted that he had taken the car (Tr. 47-48). The witness further testified that the appellant had said:

". . . you looked like you would have shot me.",

but referred to the remark as a "joking" conversation. When the witness testified at trial about appellant's admissions he acknowledged that there were three officers in the room at the time and that officers were coming in and going out of the room at various intervals (Tr. 131-132).

The appellant denied making the statements in his testimony at the hearing. The Court found that both statements were voluntarily given, that appellant had been fully advised of his rights and that he had understood those rights (Tr. 72). The statements were subsequently admitted

into evidence, over objection of defendant's counsel not as part of the Government's case in chief but in rebuttal to defendant's testimony at trial (Tr. 119-135).

After both the Government and the defense had rested their cases, counsel for the Government sought and was granted permission by the Court, over objection of defense counsel, to introduce an exhibit into evidence identified as a copy of the Warning of Rights card used by the Metropolitan Police which one of the police witnesses testified was similar to that used by him to advise appellant of his rights (Tr. 141). The trial proceeded immediately with closing arguments and the charge to the jury.

In the course of his instructions, the trial judge advised the jury that a prior inconsistent statement of a witness could serve to impeach his present testimony, but that the prior statement could not be used to establish the truth of any fact contained in the statement (Tr. 163-164). Later in the instructions the Court made reference to an alleged confession by the appellant stating that the confession could be regarded as evidence of guilt, if found by the jury to have been voluntarily made, but was to be disregarded entirely if determined to have been involuntarily uttered (Tr. 165-166). The Court did not instruct the jury whether a confession could be regarded as a prior inconsistent statement, nor did it expressly state that any confession of the appellant could not be used for impeachment purposes, if the jury concluded the statement was not freely given.

After receiving the instructions, the jury retired and subsequently returned a verdict of guilty.

STATUTES INVOLVED

District of Columbia Code (1967)

§22-2204. Unauthorized use of vehicles.

Any person who, without the consent of the owner shall take, use, operate, or remove, or cause to be taken, used, operated or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

STATEMENT OF POINTS

(1) The trial court erred in permitting the voluntariness of statements allegedly made by appellant while in custody to be determined by the jury, since the uncontradicted evidence of circumstances in which the statements were made did not permit the jury to find beyond a reasonable doubt that the admissions were freely given.

(2) It was error for the trial court to allow the introduction of an exhibit of the Government into evidence after both sides had rested without allowing defendant's counsel opportunity to inquire about the competency of the exhibit.

(3) When the Government declined to offer into evidence statements of the appellant as part of its case in chief, the trial court erred in not ruling, prior to appellant's taking the stand, whether such statements offered in rebuttal would be received as evidence or limited to use for impeachment.

(4) The instructions to the jury were inconsistent and misleading since they allowed the jury to find that appellant's testimony had been impeached through a confession which the jury might have determined was illegally obtained.

SUMMARY OF ARGUMENT

In this appeal, appellant submits that the treatment by the trial court of certain statements alleged to have been made by him while in custody, either in permitting the question of their voluntary nature to be submitted to the jury or in the particular instructions by which the statements were submitted, constituted reversible error.

The trial court was not warranted in submitting the issue of the voluntariness of any confession or admission to the jury since the evidence that was uncontradicted in the record precluded a jury from finding beyond a reasonable doubt that such statements were freely given. An atmosphere of coercion prevailed at the scene of appellant's arrest where his first statement was purportedly made. An unusually large number of police officers were present while appellant remained handcuffed to a tree or utility pole. The atmosphere was not changed as appellant was moved immediately to the police precinct where within a short period of time he was alleged to have made the second of the two statements.

If it is assumed for purposes of argument that testimony about such statements was properly received at trial, the court below nevertheless erred in failing to rule before the defendant took the stand whether the statements would be allowed for impeachment purposes only or admitted as affirmative evidence where the Government offered the statements in rebuttal and not as part of its case in chief. Although defense counsel did not seek such a ruling, the failure of the Court to rule on the issue was materially prejudicial to the defendant by preventing a knowledgeable decision on his part on whether to remain silent or to take the stand in his defense.

In charging the jury on the treatment to be accorded the statements of the appellant, the trial court gave misleading instructions which substantially affected appellant's right to a clear determination of the issue of his guilt by the jury. The Court below failed to distinguish for the jury the use of a prior inconsistent statement and that of a confession. The jury was left with the impression that a confession which it might find was improperly obtained could nevertheless be used to impeach the testimony of the appellant.

Appellant submits that the introduction of a Government exhibit relating to the question of the voluntary nature of his statements, after both sides had rested, was error, which, when combined with the misleading manner in which the trial court submitted the statements to the jury, constituted reversible error.

ARGUMENT

With respect to Point 1, appellant desires the Court to read the following pages of the reporter's transcript:
Tr. 35-72, 136-137.

Point 1. STATEMENTS MADE BY APPELLANT WERE IMPROPERLY ADMITTED INTO EVIDENCE FOR THE JURY'S CONSIDERATION SINCE THE CIRCUMSTANCES UNDER WHICH THEY WERE UTTERED ESTABLISH BEYOND A REASONABLE DOUBT THAT THEY WERE INVOLUNTARILY MADE

Following the testimony of the defendant on direct examination the Government was permitted to introduce, over objection, the testimony of two police officers on rebuttal, each of whom testified to a statement made by the defendant after his arrest. The Court had previously conducted a preliminary hearing, out of the presence of the jury, after which it had concluded that the jury could find beyond a reasonable doubt that the statements had been voluntarily made.

Although there were certain conflicts in the testimony of the defendant and the police officers during the preliminary hearing, appellant submits that other evidence surrounding the admissions required a finding by the Court that the statements were involuntarily made and a withdrawal of that issue from the jury. As involuntary utterances, the statements should not have been presented by the Government as evidence in support of its case. Ziang Sung Wan v. United States, 266 U.S. 1 (1924). Since the statements related to necessary elements in the Government's case of unauthorized use of a motor vehicle and did not involve collateral issues, it would not have been proper to have permitted the use of an illegally obtained statement for impeachment purposes. Johnson v. United States, 120 U.S. App. D.C. 69, 344 F.2d 163 (1964). Whether a confession or admission has been improperly coerced is, of course, a determination confined to the particular facts of a given case. The events which have preceded an actual statement must be considered together with the immediate attendant circumstances. United States ex rel. Johnson v. Yeager, 327 F.2d 311 (3rd Cir. 1963). The ultimate question is whether the will of a defendant has been overborne resulting in the confession, without regard to the actual use of force or physical mistreatment. Reck v. Pate, 367 U.S. 433 (1961).

When appellant was apprehended in the vicinity of the automobile which was unauthorizedly used, he was, according to the testimony of the Government's witness, surrounded immediately by at least six police officers most of them uniformed. There were four or five police vehicles in the area. As soon as appellant was arrested, he was handcuffed to a tree or traffic

pole. According to the officer's testimony his rights were then read to him. There was no evidence of weapons found on appellant's person nor indication that he was armed or suspected of other offenses. The appellant testified at trial that he was nineteen years of age but had completed only the eighth grade in school.

While handcuffed to the tree, appellant made a statement that implicated him to the extent of an admission that he had been in the vehicle. With several policemen in the vicinity, the appellant, still handcuffed, was taken immediately to the Fourteenth Precinct. He was placed in a room with at least three officers present, with others coming in and going out of the room. While being questioned during his processing appellant made a second oral statement which fully implicated him of the offense of unauthorized use. From the testimony of the police officers in the record, it may be concluded that both statements could have been made within a half hour of each other.

The atmosphere at the scene of the arrest was unduly coercive. The private automobile of one of the police officers had been taken without authorization. In this context the presence of what would otherwise appear to be an unusual number of police is understandable, but it nevertheless created a situation when taken with the personal circumstances of the appellant that rendered any statement made at that time, involuntary.

Appellant submits that this coercive aura was not dispelled after he was taken to the police station. Appellant has ascertained that the vehicle involved belonged to one of the police officers in the room, and although the officer involved in the interchange which led to appellant's

second admission treats the conversation lightly, there is clear indication that the defendant, whether warranted or not, was concerned about his physical well being by reason of the fact that the property of that officer had been involved in the offense.

Appellant acknowledges that considerable discretion is granted to the trial court in ruling on the competency of a confession or admission. Moser v. United States, 381 F.2d 363 (9th Cir. 1967). Nevertheless, the ultimate issue is whether the jury can conclude beyond a reasonable doubt that such admissions are voluntary. Pea v. United States, ____ U.S. App. D.C. ____, 397 F.2d 626, 637 (1968) en banc. The evidence on the issue in the instant case, without regard to the testimony which was controverted does not warrant such a finding.

With respect to Point 2, appellant desires the Court to read the following pages of the reporter's transcript:
Tr. 62, 120-122, 136-140, 141, 165-167

Point 2. IF THE DETERMINATION OF THE VOLUNTARINESS OF THE CONFESSION WAS PROPERLY LEFT TO THE JURY, THE ALLOWANCE OF THE INTRODUCTION INTO EVIDENCE OF THE GOVERNMENT'S EXHIBIT AFTER BOTH SIDES HAD RESTED AND THE INCOMPLETE INSTRUCTION BY THE COURT ON THE ISSUE OF THE CONFESSION COMBINED TO PREJUDICE THE DETERMINATION.

Assuming arguendo that the issue of the voluntary nature of the confession was properly left to the jury, the court nevertheless made material errors in the manner in which their determination was given to the jury.

After both sides had rested, the court, over objection by the defense, permitted the Government to introduce into evidence an exhibit which appeared to be a copy of a police department form, PD 47, identified during the trial as a "Warning as to your Rights" used by police officers upon the arrest of an accused. The question of whether the appellant was fully advised

of his rights at the time of arrest was a factor in the issue of the voluntary nature of the confession, and it was the assertion of defense counsel that undue weight would be given to the introduction of the exhibit.

The trial court is generally afforded wide discretion in determining whether a case may be reopened for the introduction of additional evidence. The authorities which recognize such discretion, however, stipulate that the opposing side must be permitted to respond to such evidence through cross-examination or otherwise. 23 C.J.S. Criminal Law §1055. In the instant case, the court proceeded immediately to closing arguments without giving the defense the opportunity to re-examine the circumstances of the purported use of the exhibit by the police at the time of the arrest. Under these circumstances, it was error to permit the introduction of the Government's exhibit into evidence.

In its instructions to the jury the court appears to have addressed itself to the two statements allegedly made by the appellant. The court used the term "confession" in the singular and included an instruction on prior inconsistent statements. Despite this ambiguity, other references in the record seem to indicate that the court regarded the first utterance as an admission, if not a confession, and not merely a prior inconsistent statement (Tr. 136-140). It was incumbent on the court in view of the existence of two statements to comment on the possible relationship between them. The defendant was entitled to a further instruction that if the jury found the prior statement to be involuntarily given, it could give weight to that conclusion in determining whether the sequence of events leading to the second statement was so closely related to the time of arrest to render the latter admission involuntary. Leyra v. Denno, 347 U.S. 556 (1954).

With respect to Point 3, appellant desires the Court to read the following pages of the reporter's transcript:
Tr. 147-149, 165-167

Point 3. IF THE STATEMENTS MADE BY APPELLANT WERE PROPERLY ADMISSIBLE AS VOLUNTARILY MADE, THE FAILURE OF THE COURT TO LIMIT THEIR USE, WHEN OFFERED IN REBUTTAL, EFFECTIVELY DEPRIVED APPELLANT OF HIS OWN RIGHT TO DECIDE WHETHER HE SHOULD TAKE THE STAND IN HIS OWN DEFENSE.

The presentation of the Government's case was interrupted at the request of counsel for the Government in order to conduct a preliminary hearing to determine the admissibility of the statements allegedly made by appellant to the police officers. Although the court ruled at the conclusion of the hearing that the statements were admissible, the Government chose not to offer the statements in evidence as part of its case-in-chief, but offered them in rebuttal to defendant's testimony.

In his closing argument, counsel for the Government referred to the first statement made by the appellant at the scene of the arrest as both evidence of guilt and impeachment of appellant's testimony. Reference was made to defendant's second admission as a full confession of guilt. Without express reference to the particular statement, the court first instructed that a prior inconsistent statement may be considered only in determining the credibility of the witness. The court then referred to the alleged confession of the defendant and charged that the jury could consider the statement as evidence of appellant's guilt.

Although it is not clear whether the court regarded both statements of the appellant as confessions in its charge, appellant submits that once the Government elected not to introduce the statements as part of its case in chief, the court should have ruled in advance of the appellant's taking the stand whether the introduction of his statements in rebuttal would be allowed as evidence of guilt or limited to impeachment purposes.

The defendant was entitled to such a determination in order to permit him effectively to make a decision about testifying in his own behalf. This right has been recognized in an analagous situation in which a defendant may obtain a prior ruling from the court on the admissibility of prior convictions in rebuttal to his testimony. Luci v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

Although it would have been preferable for defendant's counsel to have sought such a ruling from the court before the defendant testified, the failure of the court to limit the use of defendant's statement to impeachment purposes in the absence of a prior determination on the extent of their use constituted plain error. Defendant was deprived of an adequate opportunity to exercise his right to remain silent.

When the Government chose not to proffer defendant's statements as part of its case in chief, counsel for the defendant had reason to believe that the Government might seek only to use the statements for impeachment and that the court would so instruct. Lockley v. United States, 106 U.S. App. D.C. 163, 270 F.2d 915 (1959). There is authority which would prohibit the use of confessions as evidence of guilt when introduced in rebuttal. Willis v. State, 37 Ala 185, 66 So. 2d 753 (1953).

As a matter of tactics, it was logical for defense counsel to conclude that in light of the question of competency raised about the statements, the Government might have withheld the admissions for rebuttal, and if the confessions were later determined to have been involuntary, might have sought to uphold their use for impeachment within the limitations set forth in Walder v. United States, 347 U.S. 62 (1954); White v. United States, 121 U.S. App. D.C. 287 349 F.2d 965 (1965). Although the

Government ultimately sought the full use of the confession as evidence, it was not made evident until the Government's closing argument and the charge to the jury, after the defendant had taken the stand.

To hold that a defendant is entitled to a ruling, prior to his decision about testifying, on the use to be made of an admission or confession offered in rebuttal will not detract from the discretion allowed the trial court in permitting the introduction of affirmative evidence at varying times in the trial. Belvin v. United States, 273 F.2d 583 (5th Cir. 1960); Samish v. United States, 225 F.2d 358 (9th Cir. 1955).

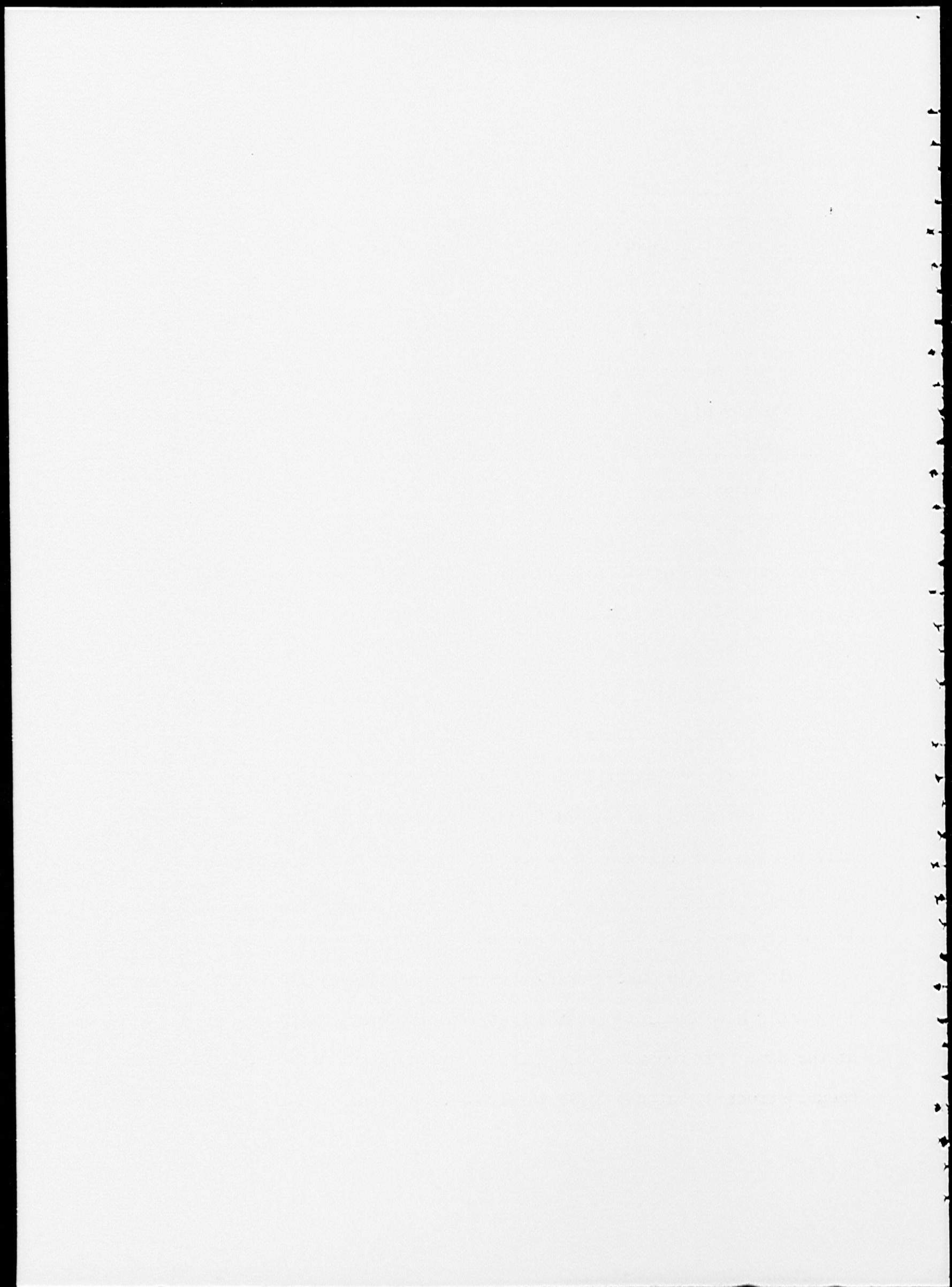
The recognition of a right to such a ruling will effect a balance between the exercise of the court's discretion about the timing in presentation of evidence and the exercise of the defendant's rights to remain silent or take the stand. Appellant submits that it is not necessary to the decision of this issue for the court to determine what situations might require a limitation of a confession in rebuttal to impeachment purposes. When the Government has the alternative of asking the court to permit the use of statements as affirmative evidence or as impeachment, the preservation of defendant's rights to remain silent should sanction a prior ruling on this matter. In the instant case, this consideration was of vital importance to the appellant. With the knowledge that the statements would be admitted as evidence of guilt, the defendant might well have chosen to have remained silent and to have relied on the cross-examination of the Government's witness as his defense. The absence of a prior ruling prevented a meaningful election and constituted reversible error.

With respect to Point 4, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 159-167.

Point 4. THE FAILURE OF THE TRIAL COURT TO DESIGNATE BOTH STATEMENTS OF APPELLANT AS ADMISSIONS OR CONFESSIONS RATHER THAN AS PRIOR INCONSISTENT STATEMENTS WAS ERROR, SINCE THE JURY BY FINDING THAT THE STATEMENTS WERE INVOLUNTARILY MADE COULD NOT PROPERLY HAVE USED THEM AS A BASIS FOR DISBELIEVING APPELLANT'S TESTIMONY

As part of his charge to the jury the trial judge instructed that the testimony of a witness might be impeached by a showing of a prior inconsistent statement. The jury was further instructed that a confession if found to be voluntary could be regarded as evidence of guilt. The charge did not indicate whether the confession could be regarded as impeachment of appellant's testimony, as the Government had argued, but stipulated only that if the confession was found to be involuntary it was to be disregarded "entirely." The court did not advise the jury whether the confession could be regarded as a prior inconsistent statement, or expressly indicate that the confession could not be used for impeachment if involuntarily made. It is the position of the appellant that the statements, if involuntarily given, could not have been properly utilized for impeachment within the limited exceptions otherwise noted in Walder v. United States, 347 U.S. 62 (1954); White v. United States, 121 U. S. App. D. C. 287, 349 F.2d 965 (1965).

This ambiguity in the charge was prejudicially misleading, since the jury could have concluded that the statements were involuntarily made, but at the same time regarded them as prior inconsistent statements. Having been instructed that the false testimony of a witness on any material fact



could discredit the entire testimony, the jury may well have treated the prior statements as impeaching and the basis for conviction. Although no objection was raised to this part of the Court's instructions, the omission in the charge is entitled to consideration by this Court in accordance with Fed. Rules Crim. Proc. 52 (b). Cross v. United States, 347 F.2d 327 (8th Cir. 1965). The failure of the trial court to be more specific in its instructions on the distinctions between prior inconsistent statements and confessions makes it impossible to determine the manner in which the jury reached its decision. Where there is a distinct possibility that the error influenced the verdict, substantial rights of the appellant have been affected. Kotteakos v. United States, 328 U.S. 750 (1946).

CONCLUSION

For the foregoing reasons, appellant submits that the judgment of conviction below should be reversed and the case remanded for a new trial.

Respectfully submitted,

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March 28, 1969